

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONNA L. SMYTH,

Plaintiff,

v.

MERCHANTS CREDIT CORPORATION, a
Washington State corporation, and DAVID
and SOFIA QUIGLEY,

Defendants.

Case No. C11-1879RSL

ORDER GRANTING MOTION FOR
SANCTIONS

This matter comes before the Court on “Merchants Credit’s Motions for Sanctions,” dkt. # 135. Having reviewed the memoranda, declarations, and exhibits submitted by the parties and the remainder of the record, the Court finds as follows:

I. BACKGROUND

Plaintiff Donna Smyth filed this Fair Debt Collection Practices Act (“FDCPA”) action on November 8, 2011. Compl. (Dkt. # 1). In her amended complaint, Plaintiff alleged that Defendants Merchants Credit Corporation (“Merchants”), David Quigley, the President of Merchants, and his wife, Sofia Quigley, Merchants’ Vice President, violated various provisions of the FDCPA in Merchants’ attempt to collect payment on a debt from Plaintiff related to medical bills. Am. Compl. (Dkt. # 21) ¶¶ 24-67. In October 2013, the Court granted Ms. Quigley’s unopposed motion for summary judgment and dismissed Plaintiff’s claim against her

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1 individually. Order (Dkt. # 79).

2 Following several continuances, trial was scheduled for March 31, 2014. Order (Dkt. #
3 91). On March 19, 2014, the deadline for the parties to submit their agreed pretrial order,
4 Merchants and Mr. Quigley (collectively “Defendants”) filed a status report summarizing
5 Plaintiff’s counsel’s failure to participate in trial preparations. Status Report (Dkt. # 104).
6 Despite Defendants’ counsel’s multiple attempts to engage in a conference regarding the pretrial
7 order, Plaintiff’s counsel did not communicate with Defendants’ counsel until the day before the
8 deadline and even then did not provide a list of potential witnesses and exhibits. Decl. of
9 Kimberlee Walker Olsen in Supp. of Status Report (“Status Report Decl.”) (Dkt. # 105) ¶¶ 2-3.
10 Ex. 1, Ex. 2. Plaintiff’s counsel provided a list of witnesses on March 21, 2014. Decl. of
11 Kimberlee Walker Olsen in Supp. of Mot. (“Olsen Decl.”) (Dkt. # 136) ¶ 3. Based on this late
12 disclosure, Defendants’ counsel sought the transcript of Steve Sexton, Plaintiff’s former co-
13 worker, on an expedited basis. Id. Plaintiff’s counsel neglected to engage in discussions
14 regarding the admissibility of exhibits before trial and thus, Defendants filed a supplemental
15 motion *in limine* seeking an order allowing two records custodians to testify at trial via telephone
16 because both witnesses live and work more than 100 miles away. Mot. in Limine (Dkt. # 115).
17 The day before trial, Plaintiff’s counsel filed and served a list of trial exhibits and a proposed
18 pretrial order. Plaintiff’s counsel did not file a trial brief.

19 The case proceeded to trial on March 31, 2014. During trial, counsel for Plaintiff
20 stipulated to the admissibility of the third-party documents. Thus, the records custodians did not
21 testify in person or by telephone. After the close of Plaintiff’s case, the Court granted Mr.
22 Quigley’s motion for judgment as a matter of law. Minute Entry (Dkt. # 125). The following
23 day, the jury returned a verdict for Merchants and judgment was entered accordingly. Jury
24 Verdict (Dkt. # 131); Judgment (Dkt. # 132). Merchants now seeks to impose sanctions against
25 Plaintiff’s counsel under Local Civil Rules (“LCR”) 11 and 16, and 28 U.S.C. § 1927, based on
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counsel's failure to participate in trial preparations and failure to comply with the deadlines set forth in LCR 16 and the Court's amended scheduling order.

II. DISCUSSION

28 U.S.C. § 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Because § 1927 authorizes sanctions for the multiplication of proceedings, it applies only to unnecessary filings and tactics that occur after the complaint is filed: the statute does not apply to the initial pleading. See Matter of Yagman, 796 F.2d 1165, 1187 (9th Cir. 1986). In addition, an award of fees under the statute requires a finding of subjective bad faith. New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir. 1989). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." Estate of Blas v. Winkler, 792 F.2d 858, 860 (9th Cir. 1986) (citations omitted). "For sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass." In re Keegan Mgmt. Co., 78 F.3d 431, 436 (9th Cir. 1996).

Although the statute sets a high threshold before a party will be required to reimburse its opponent for a portion of its expenses, the Court finds that Plaintiff's counsel's dilatory conduct was unreasonable and multiplied the proceedings unnecessarily. Apparently aware of his shortcomings leading up to trial in this matter, Plaintiff's counsel admits that "as a professional, he has an obligation to do better and he will." Response (Dkt. # 141) at 1. He concedes that his failure to provide opposing counsel with a proposed pretrial order in a timely manner caused Merchants to incur an unnecessary cost to obtain a transcript of Mr. Sexton's deposition before

1 trial. Id. at 2. Of greater concern to the Court, however, is Plaintiff's counsel's failure to
2 communicate with Merchants' counsel until less than two weeks before trial. When he finally
3 did provide a draft proposed pretrial order on March 19, 2014, it was completely devoid of
4 substance. Status Report Decl., Ex. 2 (Dkt. # 105-2). It did not contain a statement of Plaintiff's
5 claims, a list of witnesses who might be called by Plaintiff and the nature of the expected
6 testimony of each witness, or a list of exhibits that would be offered at trial. Id. As Plaintiff's
7 counsel acknowledged at the time he gave it to Merchants' counsel, "[i]t needs a lot of work."
8 Id. at 2. The only information in the proposed pretrial statement consisted of boilerplate
9 language, proving unhelpful for Merchants' trial preparation.

10 In addition, Plaintiff's counsel's delayed disclosure of exhibits and refusal to discuss the
11 admissibility of exhibits forced Merchants to incur unnecessary fees to ensure the records
12 custodians would be available and permitted to testify. See Olsen Decl. ¶ 5. Absent any
13 indication regarding Plaintiff's willingness to stipulate to the admissibility of certain business
14 records, Merchants was forced to issue subpoenas and seek alternative means for the records
15 custodians to testify at trial. Although Plaintiff's counsel now argues that "[i]t is impossible to
16 cross-examine a document," response (dkt. # 141), he still has not articulated any reason, let
17 alone a justifiable reason, for failing to communicate and cooperate with Merchants' counsel
18 leading up to trial. Moreover, Plaintiff never submitted a trial brief, further hindering
19 Merchants' (and the Court's) trial preparation. Plaintiff's repeated failure to comply with the
20 letter and spirit of the Court's local rules and the Court's amended scheduling order amounts to
21 reckless conduct that Section 1927 seeks to deter. Because these additional expenses were
22 unnecessary and the direct result of Plaintiff's counsel's actions (or lack thereof), the Court finds
23 the imposition of sanctions warranted.

24 The same conduct that gives rise to a violation of § 1927 is also sanctionable under LCR
25 11(c): any party or attorney "who without just cause fails to comply with any of the Federal
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Rules of Civil . . . Procedure, these rules, or an order of the court . . . or who otherwise multiplies or obstructs the proceedings in a case may, in addition to or in lieu of the sanctions and penalties provided elsewhere in these rules, be required by the court to satisfy personally such excess costs and may be subject to such other sanctions as the court may deem appropriate.” LCR 16 specifically authorizes the Court to impose sanctions under LCR 11 for failure to comply with the procedures and schedule set forth therein. LCR 16(m)(1).

Having determined that sanctions are appropriate in this case, the Court turns its attention to the amount to be imposed. While “district courts enjoy much discretion in determining whether and how much sanctions are appropriate,” they “may not sanction an attorney for *more* than the excess costs, expenses and fees incurred by the opposing party.” Haynes v. City & Cnty. of San Francisco, 688 F.3d 984, 987 (9th Cir. 2012) (emphasis in original) (internal quotation marks and citations omitted). As explained above, the Court finds that Merchants was forced to incur unnecessary expenses related to Mr. Sexton’s deposition transcript and the records custodians’ testimony about the authenticity of certain business records. Plaintiff’s counsel’s disclosure of exhibits and a supplemental proposed pretrial order the day before trial required counsel for Merchants to give up much of her Sunday to give attention to matters that were well overdue. Olsen Decl. ¶ 6. This conduct multiplied the proceedings unreasonably. The Court finds that an award of \$ 550 should be added to account for the additional costs incurred related to these pretrial tasks undertaken the day before trial. See United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1347-48 (9th Cir. 1985) (“Section 1927 authorizes the taxing of only excess costs incurred because of an attorney’s unreasonable conduct; it does not authorize the imposition of sanctions to reimburse a party for the ordinary costs of trial.”).

Having reviewed the records submitted in support of the motion for sanctions, the Court finds that monetary sanctions in the total amount of \$2,000 will be awarded under 28 U.S.C.

1 § 1927, LCR 16(m), and LCR 11(c) to offset the excess costs caused by Plaintiff's counsel's
2 failure to comply with the local rules governing pretrial procedures, to punish unacceptable
3 behavior, and as a deterrent to future bad conduct. Plaintiff's counsel shall, within fourteen days
4 of the date of this Order, pay \$1,450 to Merchants through its attorney. The Court finds that
5 Plaintiff is not responsible for her counsel's misconduct and therefore, Plaintiff is not
6 responsible for any portion of the payment.

7 **III. CONCLUSION**

8 For all of the foregoing reasons, Merchants' motion for sanctions is GRANTED.¹

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10 DATED this 15th day of May, 2014.

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13 Robert S. Lasnik
14 United States District Judge
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24 ¹ Plaintiff, in her response to this motion, suggests that the Court should sanction defense counsel
25 under 28 U.S.C. § 1927. Response (Dkt. # 141) at 2-3. This cross-motion, to the extent that it is
26 procedurally appropriate, lacks merit and is, therefore, DENIED.